89-740

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

EVELYN S. MIURA and DAYNA HU,

Petitioners,

vs.

WESTERN UNION INTERNATIONAL, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. May unionized employees bring their claims for violations of federal and state statutes governing payment of wages in court without attempting grievance procedures,

(a) in all wage violation cases;

(b) only in those wage violation

cases that do not require interpretation or analysis of the collective bargaining agreement; or

(c) in no wage violation cases?

2. Where an employer has established a policy of deferring paying its employees for the first week of their employment until such time as their employment terminates, is the employer equitably estopped from asserting that the statute of limitations ran during the years the employment was on-going, and that the employer need not pay the wages even upon termination?

3. Is summary judgment appropriate if based on limited, undeveloped facts and where the party moving for summary judgment has engaged in misconduct that prevented the party resisting the motion from bringing the full facts to the court's attention?

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

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WESTERN UNION INTERNATIONAL, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Evelyn S. Miura and Dayna Hu respectfully pray that a writ of certiorari issue to review the judgment and memorandum decision of the United States Circuit Court for the Ninth Circuit, entered in this proceeding on May 12, 1989.

OPINIONS BELOW

The Memorandum of the Court of Appeals is reprinted in the appendix hereto, "Appendix 1", infra at i.

The decisions of the District Court for the District of Hawaii are found in the orders reprinted in the appendix hereto, "Appendix 2", infra at xi, and "Appendix 3", infra at xiii.

None of these decisions has been reported.

JURISDICTION

Petitioners seek review of the Memorandum Decision of the Ninth Circuit, entered May 12, 1989.

Respondent removed the cases forming this appeal from a Hawaii state court to federal court, invoking §301 of the Labor

Management Relations Act, 29 U.S.C. §185.

Federal jurisdiction was also available with respect to the violation of the Fair Labor Standards Act, 29 U.S.C. §216 et seq.

On Petitioners' timely Petition for Rehearing and Suggestion for Rehearing En Banc, the Ninth Circuit Court of Appeals entered its Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc on August 11, 1989.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

FAIR LABOR STANDARDS ACT OF 1938, as amended, 29 U.S.C. §§206, et. seq.:

Every employer shall pay to each of his employees who in any workweek is engaged

in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates: . . .

§216(b) Any employer who violates the provisions of §206 or §207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages ... and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves or other employees similarly situated.

Hawaii Revised Statutes, §388-11 (a):

Employee remedies. Action by an employee to recover unpaid wages may be maintained in any court of competent jurisdiction ....

STATEMENT OF THE CASE

This appeal involves the non-payment of wages and the non-payment of a cost of living adjustment. Petitioners were employees of Respondent, the terms of their employment governed by a nationwide collective bargaining agreement.

At the time Petitioner Evelyn S. Miura started working for Respondent Western Union International, Inc. (WUI), in 1967, WUI's policy, followed only in Hawaii, and not contained in the nationwide collective bargaining agreement, was to defer paying an employee's first week's wages until such time as the employment terminated, and then to pay the wages at the rate the employee was receiving at the time of termination. The policy was summarized in the following WUI memorandum prepared by

the manager of the Hawaii office:

November 20, 1975

R. G. Mugge
NYK

Ref: Payroll Holdback

Attached is a list of all employees who have had the first weeks [sic] wages held back. This list includes date of employment, weekly rate at start and current weekly rate.

All employees who were hired after June, 1966 and since terminated, received their holdback at their rate upon leaving. Employees hired prior to June, 1966 did not have a holdback.

We will discontinue holding back the first weeks [sic] pay for all future employees.

Regards,

A. J. Pavao

AJP:slt
Attachment

Although Mrs. Miura was terminated in 1984, at which time under its peculiar Hawaii policy WUI ought to have paid her pursuant

to this policy, WUI has never paid Miura wages at any amount for the first week of her employment. WUI's Human Resources Director testified that the wages were owed and ought to have been paid.

Both Mrs. Miura and Mrs. Hu asserted that, under the terms of this collective bargaining agreement, they were entitled to a cost of living adjustment factored into their severance pay when WUI terminated them in connection with a general force reduction in Hawaii. They were not paid this COLA.

Mrs. Miura and Mrs. Hu originally brought suit against WUI in Hawaii state court in May 1986. Mrs. Miura claimed nonpayment of her first week's wages. Both Mrs. Miura and Mrs. Hu claimed that their severance pay should have included the 15% Cost of Living Adjustment ("COLA").

WUI had the matters removed to federal

court in June 1986. WUI's initial motion for summary judgment were denied in August 1986 by Judge Harold M. Fong. A second motion for summary judgment was presented to a visiting federal Judge, J. Spencer Letts. Additional facts considered in this second motion were found in a abbreviated last-minute deposition upon written questions dealing with the union's position relative to the severance pay matter. Judge Letts dismissed all causes of action.

His reasoning for dismissing Mrs. Miura's first week's wages claim was not stated at all in his initial decision (see, Appendix at xiii). In an amended order, he reasoned that the collective bargaining agreement did not provide for payment of first week's wages.

Judge Letts indicated that he felt the position of Petitioners' union was of importance in deciding the summary judgment

motion. Respondent provide Judge Letts with the deposition taken in New York City upon written questions of the union official in charge of this case, regarding the union's position. This superficial deposition was taken just before the summary judgment motion. Earlier, Petitioners' Hawaii counsel had travelled to New York City to take the oral deposition of the same union official. Petitioners' counsel's effort to take this crucial deposition was stymied when counsel for WUI falsely advised counsel for the union that Petitioners' cases had been dismissed. Believing that there was no pending action, the union attorney refused to proceed with the deposition. Without the oral deposition, the full facts were not brought out, but Judge Letts still granted summary judgment, and the severance pay cause of action was thus also dismissed.

The Ninth Circuit, in regard to Mrs. Miura's first week's wages claim, assumed that this claim was cognizable under the Fair Labor Standards Act and a similar Hawaii minimum labor standards law. However, the Ninth Circuit ruled that, because there is implicit in any collective bargaining agreement the expectation that the wages called for in the agreement will be paid, the collective bargaining agreement was breached, and "because she did not exhaust her union remedies, her claim in federal court is barred."

In spite of the evidence of WUI's policy and Mrs. Miura's reliance on it, the Ninth Circuit additionally rejected her first week's wages claim as barred by the statute of limitations. This approach had been rejected by the District Court. The employer, in maintaining a policy of payment at a higher rate upon termination,

had necessarily lulled its employees into thinking their wages would be paid even after they had remained employed the two full years it would take for the statute to run. The implementation of WUI's deferred payment policy amounted to an equitable estoppel to plead the statute of limitations.

With regard to issue of the undeveloped state of the record going into the summary judgment motion (due to the thwarted oral deposition), the Ninth Circuit called the matter a discovery issue (see, Appendix, infra, at x), and applied the abuse of discretion standard of review(see, Appendix, infra, at v). The use of deposition as the predicate for a summary judgment motion is not by any means a discovery technique. In this situation, the facts available to the court and actually applied by the both the District Court and the

Ninth Circuit (see, Appendix, infra at ix) in resolving the summary judgment motion and therefore the entire case were suppressed and manipulated by the party seeking summary judgment.

REASONS FOR GRANTING THE PETITION

I.

THE NINTH'S CIRCUIT'S ANALYSIS CLASSIFYING ALL UNPAID WAGE MATTERS AS BREACHES OF COLLECTIVE BARGAINING AGREEMENTS AND THUS RESTRICTED TO UNION GRIEVANCE PROCEDURES RUNS AFOUL OF THE COMPETING PRINCIPLES THAT COURT REMEDIES ARE AVAILABLE (A) IN ALL MINIMUM LABOR STANDARD LAW VIOLATION CASES, OR (B) UNLESS INTERPRETATION OF THE COLLECTIVE BARGAINING AGREEMENT'S TERMS IS ESSENTIAL.

Previous cases have developed various standards to judge whether a minimum labor standards violation case is entitled to be resolved in a judicial or a non-judicial forum. In some applications, these standards contradict one another. Some cases

have indicated that all such cases are entitled to be heard in court, while others have held that only where the asserted rights arise out of the statute and not the collective bargaining agreement may they be heard in court. Numerous other cases hold that the right to a judicial forum depends on whether the claim requires construction of the terms of the collective bargaining agreement or whether the rights involved are inextricably intertwined with the agreement's terms. This case affords this Court the opportunity to clarify the controlling factors, which seem to trouble the Ninth Circuit and innumerable shop stewards.

In its Memorandum Decision, the Ninth Circuit noted that Mrs. Miura herself conceded that "implicit in [the Agreement] and in any collective bargaining agreement is the expectation that the wages called

for in the schedules will actually be paid." Thus, the Court reasoned, "nonpayment of Miura's first week's wages constitutes a breach of the Agreement by WUI, and because she did not exhaust her union remedies, her claim in federal court is barred." Under this analysis, since wages claims inevitably implicate the wage provisions of collective bargaining agreement, all cases involving non-payment of wages will have to be resolved under union grievance or arbitration procedures, notwithstanding federal and state laws mandating the manner, time and amount of wage payments.

Since the nationwide collective bargaining agreement never contemplated the policy of withholding an employee's first week's wages, and had no provision for doing so, the involvement of the collective bargaining agreement in this claim is

limited to ascertaining that the agreement does call for employees to receive wages. Paradoxically, the District Court's only stated reason for denying Mrs. Miura's claim was that the collective bargaining agreement did not provide for the payment of first week's wages. This comment was completely at odds with the collective bargaining agreement itself, which, like every collective bargaining agreement, calls for wages to be paid. Naturally, the collective bargaining agreement did not explicitly single out the first week's wages, as it contemplated payment of every week's wages.

Under the terms of the F.L.S.A., and of Hawaii Revised Statutes, §388-11(a), all wages claims belong in court. This approach, opposite from the approach taken by the Ninth Circuit in this case, has been accepted by this Court in a number of

cases.

In McDonald v. West Branch, 466 U.S. 284 at 289-291, 104 S.Ct. 1799 at 1802-3, 80 L.Ed.2d 302 (1984), the employees had unsuccessfully used the grievance procedure; this Court held that the employees still had the right to sue based on the same cause of action addressed in the unsuccessful grievance. This Court expressly held that Congress intended minimum labor standards laws to be judicially enforceable, and that "arbitration could not provide an adequate substitute for judicial proceedings" in protecting rights established under federal statutes. This Court pointed out that the fact that unions, whose interests sometimes differ from interests protected in statutory rights, control the arbitration procedures presents an "additional reason why arbitration is an inadequate substitute for judicial procee-

dings". The limitations arbitrators often have, in that they sometimes are not lawyers and their expertise is only in the law of the shop, instead of the law of the land, is discussed at note 9 at 104 S.Ct. 1803.

In Atchison, Topeka and Santa Fe Railway Company vs. Buell, 480 U.S. ___, 107 S.Ct. 1410 at 1415, 94 L.Ed.2d 563 (1987), this Court held:

> This Court has, on numerous occasions, declined to hold that individual employees are, because of the availability of arbitration, barred from bringing claims under federal statutes.

Another case holding that minimum labor standards laws may be enforced in court in the face of collective bargaining agreements calling for non-judicial remedies is Barrentine vs. Arkansas Best Freight System, 450 U.S. 742, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981). The Eighth

Circuit Court of Appeals had ruled in favor of the employer, holding that wage disputes arising under the FLSA could be the subject of arbitration where the collective bargaining agreement so provided. This Court reversed, holding that the employees' FLSA rights were "independent of the collective-bargaining process", were non-waivable, and "devolve on petitioners as individual workers, not as members of a collective organization". The Court also held that Congress "intended to give individual employees the right to bring their minimum-wage claims under the FLSA in court ... because these congressionally granted FLSA rights are best protected in a judicial rather than in an arbitral forum ..." [At 450 U.S. 745, 101 S.Ct. 1447.] This Court's preference that cases of this sort be decided in court is clear from the following passage:

> Not all disputes between an employee and his employer are suited for binding resolution in accordance with procedures established by collective bargaining. While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.

This Court cited three persuasive reasons why cases implicating minimum labor standards laws cannot be delegated to union/-management arbitration procedures:

> First, even if the employee's claim were meritorious, his union might, without breaching its duty of fair representation, reasonably and in good faith decide not to support the claim vigorously in arbitration. ...
>
> Second, even when the union has fairly and fully presented the employee's wage claim, the employee's statutory rights might still not be adequately protected. Because the "specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the

> land" [citation omitted] many arbitrators may not be conversant with the public law considerations underlying the FLSA. ...
>
> Moreover, even though a particular arbitrator may be competent to interpret and apply statutory law, he may not have the contractual authority to do so. An arbitrator's power is both derived from, and limited by, the collective-bargaining agreement. Gardner-Denver, 415 U.S., at 53, 94 S.Ct., at 1022. He "has no general authority to invoke public laws that conflict with the bargain between the parties." Ibid. ...
>
> Finally, not only are arbitral procedures less protective of individual rights than are judicial procedures [citation omitted], but arbitrators very often are powerless to grant the aggrieved employees as broad a range of relief. Under the FLSA, courts can award actual and liquidated damages, reasonable attorney's fees, and costs. 29 U.S.C. §216(b). An arbitrator, by contrast, can award only that compensation authorized by the wage provision of the collective-bargaining agreement. ...

In Mrs. Miura's case, an arbitrator could not award liquidated damages, penalties, costs and attorney's fees called for under

the FLSA and Ch. 388, Hawaii Revised Statutes.

If violations of wage payment statutes may always be brought in court, as McDonald, Buell and Barrentine dictate, it should not matter that the violations of the minimum wage laws may also be violations of the collective bargaining agreement. In Barrentine, this Court noted that there was a factual dispute as to whether grievances prepared and actually processed by the union presented a claim under the FLSA as well as under the collective bargaining agreement:

> Because we hold that petitioners would not be precluded from bringing their action in federal court **in either case**, we need not resolve this factual dispute.
>
> [Emphasis Added]
>
> Barrentine, at 450 U.S. 731, n. 4, 101 S.Ct. 1440, n. 4

While the cases quoted above seem to

indicate that all wage cases hinging on federal labor standards enactments may be brought in court, other cases would limit court action to those claims that do not require an analysis or interpretation of the collective bargaining agreement.

> Therefore, state-law rights and obligations that do not exist independently of private agreements, and that as a result can be waived or altered by agreement of private parties, are pre-empted by those agreements.
>
> [Emphasis added.]

Allis-Chalmers vs. Lueck, 471 U.S. at 211, 105 S.Ct. at 1911, 85 L.Ed.2d 206 (1985).

Thus, an alternative to "always" approach may be found in cases holding that, unless the provisions of a collective bargaining agreement are merely interstitial, the aggrieved employees may be limited to resorting to the grievance procedures. This Court's decision in Lingle vs. Norge Division of Magic Chef, Inc., ____ U.S.

____, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988), allowing employees to avail themselves of state court jurisdiction even where it was necessary to examine the wage provisions of the collective bargaining agreement takes this approach. The standard is whether resolution of the statutory claim is **substantially dependent upon analysis or interpretation of the terms** of the collective bargaining agreement.

The reasoning applied by the Ninth Circuit in this case is directly in conflict with Lingle, Fort Halifax and Allis-Chalmers because the Ninth Circuit considered only whether the collective bargaining agreement was **implicitly** violated. The Ninth Circuit did not address whether the collective bargaining agreement needed to be interpreted in order to decide the statutory claim. There being no provision regarding promptness of payment, no provi-

sion of the collective bargaining agreement needed to be interpreted in this case. As this Court stated in Lingle at 1883, "as long as the state-law claim can be resolved without interpreting the agreement itself" reference to grievance procedures is not required.

This Court has expressed the test in terms of establishment of minimum labor standards that do "not intrude upon the collective-bargaining process". Fort Halifax Packing Company v. Coyne, 482 U.S. 1, 107 S. Ct. 2211, 96 L.Ed.2d 1 at 8. This view implies that absence of any conflict between the minimum labor standards law and the terms of the collective bargaining agreement is a point in favor of court jurisdiction. Since the WUI collective bargaining agreement did not even address promptness of payment, it would be hard to suggest that enforcing the federal and

state minimum wage statutes in this case would affect the collective bargaining process in the least.

The interpretation and analysis test does present some difficulty, as frequently it will be unnecessary to construe a collective bargaining agreement provision even though that provision was intended to be dispositive of the issue raised. For example, in DeLapp v. Continental Can Company, Inc., 868 F.2d 1073 (9th Cir. 1989), construing the collective bargaining agreement was unnecessary, because the employer had specifically waived its provision on the very issue the employee raised. Since the waiver unquestionably rendered the collective bargaining agreement provision naught, there was no value in interpreting the negated provision. Still, the Ninth Circuit limited the employee to his union remedies.

The Ninth Circuit's approach in the Miura case is diametrically opposed to the approach taken by the other circuits. For example, in Jackson v. Liquid Carbonic Corp., 863 F.2d 111 at 123 (1st Cir. 1988), the First Circuit afforded court remedies to employees whose statutory privacy rights appeared to have been violated. The court used the standard of rights that exist independently of the collective bargaining agreement.

It may be quite a burden for many union shop stewards to have to decide whether a member's claim, while founded upon a statute, also requires an analysis to construe the applicable collective bargaining agreement. Clarification is really needed.

II.

EQUITABLE TOLLING OF THE STATUTE OF LIMITATIONS.

The statute of limitations issue is disposed of in four lines of the Memorandum Opinion, Appendix 1, infra, at vi - vii. There is no mention at all of the issue of whether the statute is tolled by the employer's promise to pay the employee upon her termination. The situation presented is the express promise of the employer to defer the employee's first week's wages until a new condition occurred. Defendant's conduct obviously had the effect of lulling Mrs. Miura into a sense of security that the money would be paid upon termination. Only when she was terminated was this representation put to the test. Of course, the statute of limitations would run, unless tolled, while she waited for

the condition to take place. There was never any implication that the employer was not going to pay at all, but that is, unfortunately, what happened.

Equitable estoppel tolls the statute of limitations until occurrence of the condition or time contained in the representation made by the party who invokes the statute.

Thus, in Golden vs. Faust, 766 F.2d 1339 (9th Cir. 1985), statements of an insurance claims adjuster that the carrier would settle the plaintiffs' claims after the first of the year were held to estop the defendant from asserting the statute of limitations, which otherwise would have run in the interim between the time the statement was made and the referenced "after the first of the year." Likewise, in Zukowski vs. Dunton, 650 F.2d 30 at 34-35 (4th Cir., 1981), the court held:

Because Dunton acknowledged the validity of Zukowski's claim in the conversations and stated an intention to give him the stock, and because Zukowski relied upon this representation and did not take legal action, Dunton is equitably estopped from asserting the statute of limitations defense.

Equitable estoppel is applied in cases involving federal statutes. Glus vs. Brooklyn Eastern District Terminal, 359 U.S. 231 at 234, 79 S.Ct. 760 at 762-763, 3 L.Ed.2d 770 (1959).

This Court has applied this doctrine in a case where conduct of a defendant tended to dissuade the plaintiff from prosecuting her claim during the period of limitations. Allen vs. A. H. Robbins, 752 F.2d 1365 at 1371 (1985). And, in Atkins vs. Union Pacific Railroad, 685 F.2d 1146 (9th Cir., 1982), app. after remand 753 F.2d 776, the doctrine was extended to

include representations implicit in silence on the part of the party later attempting to assert the statute of limitations.

There are three modern Hawaii cases bearing on this general subject: Mauian Hotel, Inc. vs. Maui Pineapple Company, 52 H. 563 at 570-571, 481 P.2d 310 (1971), discussed in Appellants' Opening Brief at 13, and Pai vs. First Hawaiian Bank, 57 H. 429 at 435, 558 P.2d 479 (1977), discussed in Appellants' Opening Brief at 12, and First Hawaiian Bank vs. Zuckerkorn, 2 Haw.-App. 383 at 385, 633 P.2d 550 (1981), in which the Hawaii Intermediate Court of Appeals commented:

> If [the debtor's promise] is express, it may be unconditional or conditional, but if conditional, it is not effective until the condition is performed.

Until the condition in the present case, namely termination of Mrs. Miura's employment, occurred, the representation could

not be tested, so the statute of limitations could run. Unlike cases where the condition requires action on the part of the creditor that never takes place, in this case, Mrs. Miura fulfilled the required condition by getting terminated, until which time the statute of limitations was necessarily tolled.

III.

SUMMARY JUDGMENT IS INAPPROPRIATE WHERE THE FACTS ARE UNDEVELOPED DUE TO MISCONDUCT OF THE PARTY SEEKING SUMMARY JUDGMENT.

Critical to the resolution of the severance pay COLA issue was the attitude of the union. The Ninth Circuit relied on the union's supposed position in its reasoning for affirming the District Court's summary judgment. (See, Appendix 1, infra, at ix.) The trouble is that the true state of the union's position was not

placed before the court because WUI's attorney had prevented the union official's oral deposition from being taken by falsely telling the union's attorney that Mrs. Miura's and Mrs. Hu's cases had been dismissed. Advised that there was no action pending in which a deposition could be taken, the union lawyer naturally agreed that the deposition could not go on. Counsel for Petitioners had travelled from Hawaii to New York City to take the deposition, and returning to New York was not feasible. Then, just before the hearing on the summary judgment motion, WUI engineered a deposition of the same union official on brief leading written questions clearly designed to elicit limited responses and to withhold development of the entire picture. The motions judge, at the hearing on the motion, specifically noted his interest in the union's attitude, and

did not enter his decision until the deposition transcript was filed. WUI thus profited from its attorney's deceit in frustrating the taking of a complete oral deposition in which the full state of affairs would have come out in the open.

It would be extremely helpful to the bar if this Court were to comment on the use of such unscrupulous tactics.

Too often, motions courts treat matters involving deposition disputes as mere discovery problems. However, where the depositions are taken for the purpose of presenting dispositive evidence in summary judgment motions, cases may be decided on defective, tampered evidence.

The Ninth Circuit applied the wrong standard in holding that the "abuse of discretion" standard for discovery matters applied. Adequacy of evidence to warrant summary judgment is not a discovery issue.

Rule 56(e), F.R.C.P. The correct standard would have been de novo review viewing the facts in the light most favorable to the party resisting the motion. Technicolor, Inc. v. Traeger, 57 H. 113 at 118, 551 P.2d at 168 (1976).

CONCLUSION.

In light of the need for a definitive decision on whether wage claims may be presented in court, this Honorable Court is urged to approve this Petition.

The equitable estoppel issue in regard to the statute of limitations is secondary to the issue of judicial handling of wage claims. The error of the Ninth Circuit in this regard must be addressed for a meaningful result.

For this Honorable Court to address the subject of misconduct of counsel in interfering with the gathering of evidence

to be used in a dispositive motion would be of extreme benefit to the entire legal community.

Petitioners therefore respectfully request that this Petition be approved, and that a writ of certiorari be granted.

DATED: Honolulu, Hawaii, November 6, 1989.

Respectfully submitted,

Charles S. Lotsof
Counsel of Record for
Petitioners

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EVELYN S. MIURA and DAYNA HU,	)	NO. 88-1902 D.C. #CV-86-420-JSL
Plaintiffs-Appellants,	)	**MEMORANDUM**
vs.	)	
WESTERN UNION INTERNATIONAL, INC., a Delaware Corporation	)	
Defendant-Appellee.	)	

Appeal from the United States
District Court for the
District of Hawaii
J. Spencer Letts, District Judge

Argued and Submitted April 4, 1989
Honolulu, Hawaii

FILED: May 12, 1989

Before:
GOODWIN, HUG and TANG, Circuit Judges

I.

Evelyn Miura was employed by WUI from September 1967 to December 1984. Dayna Hu

was employed by WUI from April 1966 to January 1985. After Miura and Hu (collectively "the appellants") were terminated as part of a "force reduction", WUI paid severance pay to Miura on december 28, 1984, and to Hu in February 1985.

During the time of their employment with WUI, the appellants were represented by Local 111 of the American Communications Association, Communications Trade Division, International Brotherhood of Teamsters ("the Union"). WUI and the Union were parties to a collective bargaining agreement. Miura and Hu were among the WUI employees covered by the Agreement.

According to Miura, at the time she started work for WUI, the policy was to defer paying an employee's first week's wages until such time as the employment terminated, and then to pay the wages at the rate the employee was receiving at the

time of termination. Apparently, although there is a factual dispute involved, WUI has never paid Miura these first week's wages.

II.

Miura and Hu originally brought suit against WUI in Hawaii state court in May 1986. Miura claimed nonpayment of her first week's wages. Both Miura and Hu claimed that their severance pay should have included the 15% Cost of Living Adjustment ("COLA").[1]

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[1]Article X of the Agreement ("Security Rights Under Force Reduction") governs the calculation of severance pay: "Severance pay for a regular employee shall be calculated on the basis of pay for a full work week at the rate of pay at which the employee subject to involuntary furlough is working at the time he was force reduced." ¶(i)(3)(a). According to Article XXII, ¶(c), a 15% COLA applies to employees in Hawaii: "Each employee in Hawaii in a job classification covered by the Article shall be paid currently a differential equal to 15 (15) percent of the gross weekly earnings of such employee." The appellants' wages did

WUI had the matters removed to federal court in June 1986. WUI's motions for summary judgment were denied in August 1986 by Judge Fong. In November 1987, Miura and Hu filed amended complaints which included allegations that the Union acted in bad faith in failing to assist them with their severance pay claim against WUI. The district court then dismissed the claims for state law civil penalties and for punitive damages. The district court also consolidated the cases of Miura and Hu.

The district court granted summary judgment in favor of the defendants, filing an Amended Order for Summary Judgment on February 11, 1988. Miura and Hu jointly appeal.

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reflect this 15% COLA. However, WUI did not apply the 15% COLA to the severance pay.

III.

We review a grant of summary judgment de novo, International Bhd. of Elec., Workers Local 532 v. Brink Constr. Co., 825 F.2d 207, 214 (9th Cir. 1987), and may affirm on any grounds supported by the record. Smith v. Brock, 784 F.2d 993, 996 n.4 (9th Cir. 1986).

We review a district court's discovery rulings for an abuse of discretion. Beneficial Std. Life Ins. Co. v. Madariaga, 851 F.2d 271, 277 (9th Cir. 1988).

IV.

In claiming that she is still owed her first week's wages, Miura argues that, WUI's deferral of wages policy notwithstanding,[2] the non-payment of these wages

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[2]There is authority suggesting that "[p]rivate agreements between an employer and employee which have the effect of limiting or abrogating the scope or purpose of the [Fair Labor Standards] Act will not be upheld." Walling v. Lippold,

is in violation of the minimum wage provisions of the Fair Labor Standards Act ("FLSA").[3] "every employer shall pay to each of his employees . . . wages at the following rates." 29 U.S.C. §206(a) (emphasis added).[4] Miura cannot prevail be-

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72 F.Supp. 339, 346 (D.Neb. 1947). Indeed, parties "may not contract to work for less that the minimum wage rate." Wirtz v. Leonard, 317 F.2d 768, 769 (5th Cir. 1963). Furthermore, an employer may not pay less than minimum wage by deferring compensation already earned to a later pay period. Olson v. Superior Pontiac-GMC, 776 F.2d 265, 267 (11th Cir. 1985).

[3]Miura also argues that the non-payment violates state law. Hawaii Rev. Stat. ch. 388. It is unnecessary for us, however, to decide the specific question of the applicability of state law because Miura's claim would likewise be barred by any relevant state statute of limitations.

[4]We note that Miura does not allege that the wages to which she was entitled were below minimum wage. We assume, though, without deciding, that Miura's claim is cognizable under the minimum wage provisions of the FLSA. Certainly we agree that implicit in the statutory mandate of payment of minimum wages is the requirement that wages be paid promptly.

cause her claim is barred by the statute of limitations and because she did not exhaust her union remedies.

First, Miura's claim is barred by the two-year statute of limitations in the Fair Labor Standards Act. 29 U.S.C. §255(a). Her claim accrued in 1967 and the statute of limitations period expired in 1969.

Second, "[a] bargaining unit employee may not bring an action for breach of a collective bargaining agreement unless he has exhausted the contractual grievance procedures." Truex v. Garrett Freightlines, 784 F.2d 1347, 1353 (9th Cir. 1985). Miura herself concedes that "implicit in [the Agreement] and in any collective bargaining agreement is the expectation that the wages called for in the schedules will

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See Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707-708 (1945).

actually be paid." Appellant's Opening Brief at 10. Thus, the nonpayment of Miura's first week's wages constitutes a breach of the Agreement by WUI, and because she did not exhaust her union remedies, her claim in federal court is barred.

Exhaustion is not required, however, when the union acts "in such a discriminatory, dishonest, arbitrary or perfunctory fashion as to breach its duty of fair representation." Delcostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 164 (1983); see also Vaca v. Sipes, 386 U.S. 171 (1967). Miura does not claim that the Union breached its duty of fair representation with respect to her claim for first week's wages.

V.

We next consider the appellants' claim for additional severance pay. The Agreement provides that "[t]he filing of any

grievance . . . must be initiated within ten days from the occurrence giving rise to the grievance." Art. IV, ¶b. The appellants did not notify the Union until January 1986, a year after their termination. The Union decided not to file a grievance on behalf of the appellants because it did not feel that the appellants had a meritorious grievance and also because the claim was not timely. We hold that the appellants cannot prevail on this claim because they did not exhaust their union remedies in a timely manner.

VI.

Finally, the appellants claim that WUI "should not have been allowed to stonewall plaintiff's efforts to secure the union official's oral deposition and then use a less reliable deposition on written questions." Appellants' Opening Brief at 15. After reviewing the parties' briefs

and the record, we conclude that the district court did not abuse its discretion regarding these discovery issues.

VII.

The judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

EVELYN S. MIURA, Plaintiff, vs. WESTERN UNION INTERNATIONAL, INC., a Delaware corporation, Defendant.	)
DAYNA HU, Plaintiff, vs. WESTERN UNION INTERNATIONAL, INC., a Delaware corporation, Defendant.	)

AMENDED ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Court, having considered Plaintiff's Motion to Amend or Reconsider Order Granting Defendant's Motion for Summary

Judgment, Defendant's Reply and the files in these cases, hereby FINDS and Concludes as follows:

1. the collective bargaining agreement negotiated by Defendant and Plaintiffs' Union, Local 111 of American Communications Association, Communications Trade Division, International Brotherhood of Teamsters ("Local 111"), does not provide for differential equal to 15% of Plaintiff's severance pay nor does the collective bargaining agreement provide for payment of first week's wages.

IT IS THEREFORE ORDERED that Defendant's Motion for Summary Judgment shall be, and is hereby GRANTED. The Plaintiffs' actions shall be, and are hereby, DISMISSED WITH PREJUDICE.

DATED: JAN 28, 1988.

/s/ Spencer Letts
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

EVELYN S. MIURA,

Plaintiff,

vs.

WESTERN UNION INTERNATIONAL, INC., a Delaware corporation,

Defendant.

DAYNA HU,

Plaintiff,

vs.

WESTERN UNION INTERNATIONAL, INC., a Delaware corporation,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The Court, Honorable J. Spencer Letts presiding, heard Defendant's Motion For Summary Judgment on November 23, 1987. Jeffrey S. Harris appeared for the Defen-

dant. Charles S. Lotsof appeared for the Plaintiffs. The Court, having reviewed the materials on file, having heard the arguments of counsel, and being fully advised in the premises, finds and concludes as follows:

1. The collective bargaining agreement negotiated by Defendant and Plaintiffs' union, Local 111 of American Communications Association, Communications Trade Division, International Brotherhood of Teamsters ("Local 111") does not provide for differential equal to 15% of Plaintiffs' severance pay.

~~2. The Plaintiffs failed to exhaust the applicable grievance and arbitration procedure.~~ SL

~~3. Local 111 did not breach its duty of fair representation.~~ SL

~~4. The Plaintiffs' claims are barred by the applicable statute of limitations.~~ SL

It is therefore ordered that the Defendant's Motion for Summary Judgment shall be and is hereby, GRANTED. The Plaintiffs' actions shall be DISMISSED WITH PREJUDICE.

DATED: Honolulu, Hawaii, November 25, 1987.

/s/ Spencer Letts
Judge of the above-entitled Court

No. 89-740

In The

Supreme Court of the United States

October Term, 1989

EVELYN S. MIURA and DAYNA HU,

Petitioners,

vs.

WESTERN UNION INTERNATIONAL, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether employees covered by a collective bargaining agreement must exhaust the grievance and arbitration procedure established in such agreement before suing their employer on the ground that the agreement entitles them to additional payments upon separation from employment.

LIST OF PARTIES

The parent of the Respondent, Western Union International, Inc. ("Company"), is MCI, International, Inc., whose parent is MCI Communications Corp. The sole subsidiary of the Company which is not wholly owned is Western Union International, S.A.

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DECISIONS BELOW

The Petitioners seek review of an unpublished Memorandum Decision issued by the Ninth Circuit Court of Appeals. Appendix 1 to the Petition sets forth the Decision with several clerical errors irrelevant to the Petition. The accurate text of the Decision is available in Westlaw.

STATUTES INVOLVED

This case involves Section 301 of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. §185, which states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Id.

Petitioners Evelyn S. Miura and Dayna Hu ("Employees") assert that this case involves Haw. Rev. Stat. §388, which states in relevant part:

> §388-2 *Semimonthly payday.* (a) Every employer shall pay all wages due to the employer's employees at least twice during each calendar month, on regular paydays designated in advance by the employer, in lawful money of the United States or with checks convertible into cash on demand at full face value thereof; [. . .]

> (b) The earned wages of all employees shall be due and payable within seven days after the end of each pay period.
>
> §388-11 *Employees remedies.* (a) Action by an employee to recover unpaid wages may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of oneself or themselves, or the employee or employees may designate an agent or representative to maintain the action.

Haw. Rev. Stat. §§388-2(a)(b) and 11(a) (1988).

The Employees also assert that this case involves Sections 6 and 16 of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§206 and 216, which are partially set forth in the Petition at 4, and in 1967 provided a minimum wage of $1.40 per hour. H.R. 13712, 89th Cong., 2nd Sess. (1966), *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS, 978, 986-987, 994.

STATEMENT OF THE CASE

Subject Matter Jurisdiction

The United States District Court for the District of Hawaii ("District Court") had subject matter jurisdiction over the Employees' suit under Section 301 of the LMRA, *supra*, because the claim required interpretation of the collective bargaining agreement ("Agreement") between the Employees' union, Local 111 of the American Communications Association, Communications Trade Division, International Brotherhood of Teamsters ("Union"), and the Company. *Lingle v. Norge Div. of Magic Chef*, 486

U.S. 399 (1988); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *National Metalcrafters Div. of Keystone Consol. Indus. v. McNeil*, 784 F.2d 817 (7th Cir. 1986).[1]

Material Facts

When the Company laid off the Employees in December 1984 and January 1985, it paid them severance pay provided by the Agreement in the amounts of $22,350.00 and $25,702.50, respectively.

Sixteen months later, in May 1986, the Employees sued on the ground that the Agreement also required the Company to pay the Employees cost of living differentials on the severance pay of $3,360.00 and $3,864.00 respectively, and pay Employee Miura wages for her first week of work in September 1967 at the rate applied during her last week of work in January 1985 of approximately $600.00.

Neither the Employees nor their Union processed the claims asserted in this case through the Agreement's grievance and arbitration procedure.

Grounds for Decisions Below

The District Court interpreted the Agreement as applied by the Company, holding that it did not

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[1] The District Court did not have subject matter jurisdiction under Sections 206 and 216 of the FLSA, *supra*, because Employee Evelyn S. Miura ("Miura") sought additional payments upon separation from employment under the Agreement, and did not allege that the Company failed to pay her the minimum wage of $1.40 per hour provided by Section 206 of the FLSA, *supra*, in 1967.

provide for a cost of living differential on severance pay or a deferral of first week's wages.[2]

The Ninth Circuit Court of Appeals affirmed the District Court, on the alternate ground that the Employees failed to exhaust the applicable grievance procedure, and that any claims for wages earned during a week in September 1967 under Haw. Rev. Stat. §388 or Section 6 of the FLSA, *supra*, were time-barred.[3]

REASONS FOR DENYING THE WRIT

There is No Conflict Over the Exhaustion Rule

There is no conflict between the circuits regarding the question whether employees must exhaust grievance and arbitration procedures established in collective bargaining agreements between their unions and employers before suing their employers for claims that depend on interpretation of those agreements.

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[2] The Agreement based severance pay on the hourly "rate of pay", and the cost of living differential on "gross weekly earnings". Consistent with past practice known to the Union, the Company did not apply the differential to severance pay. The comprehensive wage and benefit schedule in the Agreement did not provide for deferral of first week's wages. A broad waiver and integration provision in the Agreement "superse[ded] all prior understandings, oral and written".

[3] The third question presented in the Petition at 31-34 (*ie.*, whether the District Court properly admitted the deposition testimony of the Union agreeing with the Company's interpretation of the Agreement) confirms that the employees' claims turn on an interpretation of the Agreement.

The Court answered this question affirmatively in *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965) ("*Republic Steel*"), and recently reiterated the exhaustion rule in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985) ("*Allis-Chalmers*").

In *Allis-Chalmers*, the Court held that an employee's state tort suit for delay in making payments due under a collective bargaining agreement was preempted by Section 301 of the LMRA, *supra*, and should have been dismissed for failure to exhaust the grievance procedure in the agreement.

Cases which depend on the interpretation of collective bargaining agreements such as *Republic Steel* and *Allis-Chalmers* are distinct from cases which depend on statutory rights independent of the provisions of collective bargaining agreements, such as:

> *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 737-738, 741 nn. 13, 19 (1981) ("*Barrentine*") (claim that payment due for "principal" activities under Section 6 of the FLSA, *supra*, was independent of provisions of agreement);
>
> *McDonald v. City of West Branch, Mich.*, 466 U.S. 284 (1984) ("*McDonald*") (rights and remedies against discharge in retaliation for exercise of First Amendment rights under 42 U.S.C. §1983 different than rights and remedies under agreement);
>
> *Atchison, Topeka and Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 564-566 (1987) ("*Buell*") (Federal Employers' Liability Act, 45 U.S.C. §51 *et seq.*, protection against negligent conduct by employer and co-workers is independent of employer's

obligations, and limited relief apparently available, under agreement covered by the Railway Labor Act, 29 U.S.C. §151 *et seq.*, and distinct from claim based squarely on such agreement); and

Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988) ("*Lingle*") (claim for wrongful discharge in retaliation against exercise of state worker's compensation rights did not depend on interpretation of the agreement).

The Lower Courts Correctly Decided This Case

Exhaustion

Because the Employees' claim for additional payments turned on interpretation of the Agreement rather than a statute, *Republic Steel* and *Allis-Chalmers* required dismissal for failure to exhaust, and *Barrentine, McDonald, Buell,* and *Lingle* were distinct.

If the provisions of the Agreement did not provide for a cost of living differential on severance pay or deferred wages, then the Employees were not entitled to these additional payments. Neither Haw. Rev. Stat. §388, *supra,* nor Section 6 of the FLSA, *supra,* created such rights.

Merits

The Employees have not petitioned for review of the District Court's holding that the Agreement did not provide a cost of living differential on severance pay or deferral of first week's wages.

Timeliness

Even if Miura had claimed the Company violated the minimum wage provisions of Section 206 of the FLSA, *supra*, by paying her less than $1.40 for each hour which she worked during her first two week pay period in September 1967, then the two year statute of limitations for the FLSA in Section 6 of the Portal to Portal Act of 1947, 29 U.S.C. §255(a), would have barred her claim. There was no evidence that the Company made statements equitably estopping it from relying on her over 17 years of inaction.

The Employees Were Fairly Treated

The Employees timely received the $48,052.50 in severance pay which the Company, the Employees' Union and District Court agreed they deserved. The additional $7,224.00 differential on severance pay sought by the Employees exceeds the amounts received by their co-workers.

The Employees' Position Would Create Absurd Results

The Employees' proposed rule permitting suit for wage and benefit claims which turn on the interpretation of collective bargaining agreements would undermine traditional grievance and arbitration systems and impose a corresponding burden on the courts, inconsistent with the federal policy favoring arbitration under collective bargaining agreements. Section 201 of the LMRA, 29 U.S.C. §171.

CONCLUSION

For the above reasons, the Company respectfully requests the Court to deny the Employees' Petition for Writ of Certiorari.

Respectfully submitted,

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for Respondent